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No. 95-288

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BANK OF ISRAEL, MINISTRY OF FINANCE OF THE GOVERNMENT OF ISRAEL, MOSES MANDELBAUM, GALIA MAOR AND ZE'EV ABELES,

Petitioners,

v.

NATHAN LEWIN, ESQ.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT' S BRIEF IN OPPOSITION

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INTRODUCTION

In this case, the Second Circuit ruled that the respondent, Nathan Lewin, had no improper purpose when he filed the complaint that originally gave rise to this matter. Specifically, the court held that the district court had erred as a matter of law "in concluding that it is improper for an attorney to file a nonfrivolous complaint in a new and proper forum partly as a means of enhancing his client's chances of

obtaining the settlement of another pending action" (Pet. App. 14a). The court also ruled that the district court had erred "in concluding that sanctions may be imposed for the filing of a complaint that not only is not frivolous but also wins for the plaintiff a measure of judicially imposed relief" (Pet. App. 14a).

Petitioners seek certiorari on the basis of a supposed conflict among the circuits over a question not necessary to the resolution of this matter: whether Rule 11 sanctions may be imposed on an attorney for filing a complaint that is well grounded in fact and law simply because a court finds that the purpose of filing such a valid complaint is somehow "improper." But the Second Circuit's holding that Mr. Lewin did *not* have an improper purpose for filing the complaint renders that question of academic interest only. Since the question is not outcome-determinative in this case, this Court should not accept petitioners' invitation to use this case to decide it. Moreover, petitioners' assertion that there is a conflict among the circuits is unfounded. None of the cases cited by petitioners upholds an award of sanctions against an attorney (or a party) for filing a well-grounded complaint for an "improper purpose."

ARGUMENT

A. Mr. Lewin Had No "Improper Purpose."

The underlying facts are described in the opinion of the Second Circuit, and we accordingly will not respond to petitioners' one-sided and largely irrelevant statement of the case. For purposes of this Court's consideration of the petition for certiorari, however, the most salient points are worth repeating:

- The complaint filed by Mr. Lewin has never been found to lack reasonable support in either fact or law. Indeed, the Second Circuit expressly held that "[t]he award of sanctions here cannot be upheld on the basis that the complaint or the choice of forum was not well grounded" (Pet. App. 18a), and petitioners do not challenge the court of appeals' holding on this point.

- Mr. Lewin succeeded in obtaining relief for his clients through the filing of this action, in the form of the conditions imposed by the district court on its *forum non conveniens* dismissal. As the Second Circuit noted, this was "relief that they had previously been unable to obtain from the defendants" (Pet. App. 24a).

- The New York action was not duplicative of the civil proceedings in Israel. To the contrary, as the court of appeals expressly stated, the district court "plainly did not treat the present action as congruent with the Israeli action" (*id.*).

Notwithstanding this demonstrable proof of the bona fides of the action filed by Mr. Lewin, the district court imposed sanctions on the theory that prefiling letters warning of the consequences if a lawsuit were to be filed established that Mr. Lewin's purpose in filing the complaint was partially improper. The district court imposed sanctions despite its own recognition that Mr. Lewin and his clients also had a *proper* purpose for filing, namely, obtaining relief from an American court if they were unable to resolve their grievances.

The district court's idiosyncratic theory was roundly and rightly rejected by the Second Circuit. The court of

appeals held that, where a complaint does not lack foundation in law or fact, an attorney's warnings to his opponents that his clients intend to file the complaint if their grievances are not resolved do not establish that the complaint is improperly motivated. This rebuff to petitioners' warped concept of litigation protocol is faithfully reflective of the responsible and proper conduct of litigation. Mr. Lewin deserves kudos, not brickbats, for his prelitigation attempts to reach an amicable resolution of a highly sensitive dispute.

Nor is the inclusion in an attorney's warning letter of "predictions of [the] claims' likely public perception" (Pet. App. 22a) an indication of improper purpose. Indeed, as the Second Circuit noted, "[i]t is hardly unusual for a would-be plaintiff to seek to resolve disputes without resorting to legal action; prelitigation letters airing grievances and threatening litigation if they are not resolved are commonplace, sometimes with salutary results, and do not suffice to show an improper purpose if nonfrivolous litigation is eventually commenced" (*id.*). The Second Circuit also emphasized the serious First Amendment question that would be raised were an attorney to be sanctioned as improperly motivated for having issued such a warning (or for having spoken to the press regarding matters of public interest once litigation actually commenced). *See id.*

In light of the Second Circuit's straightforward holding that Mr. Lewin did not have an improper purpose in filing the complaint, petitioners' huffing and puffing is to no avail. The fact of the matter is this: the legal issue that petitioners pose — *i.e.*, whether the filing of a nonfrivolous complaint for an improper purpose is sanctionable under Rule 11 — is simply not presented by this case.

Petitioners attempt to sidestep this difficulty by asserting that the court of appeals' ruling that Mr. Lewin had no improper purpose is a "mere offshoot" of its holding that a well-grounded complaint may not be sanctioned as improperly motivated. Pet. at 4, n.2. Petitioners are wrong. Their wild mischaracterizations of the Second Circuit's careful, thoughtful treatment are belied by the court's specific conclusion: That, under the facts and circumstances of *this case*, Mr. Lewin's purpose in filing the lawsuit was proper. *See* Pet. App. 22a-23a. The Second Circuit did not base its finding that Mr. Lewin's purpose was not improper on a legal holding that a nonfrivolous complaint can *never* be found to have been filed for an improper purpose. Rather, its ruling on this point is nothing more than a fact-bound evaluation of the motives and conduct of the parties before it.

B. There Is No Conflict.

Even indulging, *arguendo*, petitioners' pipedream that the legal issue they have framed is properly presented, the conflict among the circuits conjured up by petitioners does not exist. *None* of the cases trumpeted by petitioners actually imposes sanctions for the filing of a well-grounded complaint filed with an improper purpose.

In four of the allegedly conflicting decisions — *Lancellotti v. Fay*, 909 F.2d 15 (1st Cir. 1990); *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989); *Patterson v. Aiken*, 841 F.2d 386 (11th Cir. 1988); *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429 (7th Cir. 1987) — courts of appeals considered and approved sanctions for the filing of *frivolous* complaints. *Cohen v. Virginia Elec. & Power Co.*, 788 F.2d 247 (4th Cir. 1986), involved sanctions for the filing not of a complaint, but of a motion — a circumstance expressly distinguished by the

Second Circuit and the decisions on which it relied. *See* Pet. App. 20a-21a.

In the final case — *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988) — the Seventh Circuit held that sanctions were required for the filing of certain claims that were objectively groundless as a legal matter, and it remanded to the district court for further consideration of the question whether other claims were well grounded and/or filed for an improper purpose. In *Szabo*, as in the other cases cited by petitioners, there was no holding awarding sanctions for a well-grounded but improperly motivated complaint.

Petitioners can point to no case in which a federal court of appeals has squarely held that sanctions may be imposed on an attorney who has filed a well-grounded complaint for an improper purpose. Moreover, none of the cases petitioners cite even *hints* that an attorney may be sanctioned for improper motive for filing a lawsuit that actually results in a measure of relief for his clients. Thus, even if Mr. Lewin's purpose had been improper, there would be no warrant for addressing the issue posed by petitioners.

CONCLUSION

The petition for certiorari in this case shows the lengths to which petitioners will go in their zeal to retaliate against Mr. Lewin for having had the temerity to represent his clients against them. Petitioners simply brush aside the conclusion of the highly distinguished panel of the Second

Circuit that Mr. Lewin had no improper purpose, and they claim a conflict where none exists. The petition is doubly flawed. It should be denied.

Respectfully submitted,

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